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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 (SAN FRANCISCO DIVISION)

11 On Appeal from the United States Bankruptcy Court  
for the Northern District of California  
12 Hon. Edward D. Jellen

13 ALPHAMED PHARMACEUTICALS  
CORP.,

14 Claimant-Appellant,

15 v.

16 ARRIVA PHARMACEUTICALS, INC.,

17 Reorganized Debtor-  
18 Appellee.

No. 08-01279-SI

**NOTICE OF MOTION AND MOTION  
TO DISMISS AS MOOT THE APPEAL  
OF ALPHAMED PHARMACEUTICALS  
CORP. OF THE PLAN  
CONFIRMATION ORDER AND  
MEMORANDUM OF POINTS AND  
19 AUTHORITIES IN SUPPORT  
20 THEREOF**

Date: May 23, 2008

Time: 9:00 a.m.

Location: Courtroom 10, 19<sup>th</sup> Floor  
450 Golden Gate Ave.  
San Francisco, CA 94102

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**NOTICE OF MOTION AND MOTION**

Please take notice that pursuant to Fed. R. Bankr. P. 8011(a), Reorganized Debtor-Appellee Arriva Pharmaceuticals Corp. ("Arriva") hereby submits this Motion to Dismiss as Moot the Appeal of AlphaMed Pharmaceuticals Corp. (the "Motion") of the order of the Bankruptcy Court confirming Arriva's plan of reorganization (the "Plan Confirmation Order").<sup>1</sup>

Arriva requests this Court to dismiss the appeal of AlphaMed Pharmaceuticals Corp. ("AlphaMed") as both equitably and constitutionally moot. In support of the Motion, Arriva submits the Declaration of Philip J. Barr (the "Barr Declaration") and the Declaration of M. Sue Preston (the "Preston Declaration"). Arriva has attached to each of these declarations various exhibits, each of which is either drawn from the record on appeal or supports a pertinent fact that has occurred since the filing of the notice of appeal.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

AlphaMed appeals a final order of the United States Bankruptcy Court for the Northern District of California (the "Bankruptcy Court") confirming Arriva's Fourth Amended Plan of Reorganization (the "Plan"). Following intensive bankruptcy proceedings, the Plan received 100% approval from the voting creditors. Then, after the Bankruptcy Court issued the Plan Confirmation Order, Arriva duly "closed" the Plan and the "Effective Date" of the Plan took place for the benefit of all creditors. Yet on appeal, AlphaMed asks this Court for extraordinary relief. Namely, AlphaMed asks this Court to overturn the Plan Confirmation Order, reversing millions of dollars of transfers of funds that took place on the Effective Date of the Plan.

<sup>1</sup> This Court currently has five open associated cases before it: *In re Arriva Pharmaceuticals Inc.*, 08-00691-SI; *Protease Science, Inc. v. Arriva Pharmaceuticals, Inc.*, 08-00692-SI; *Sonoran Desert Chemicals, LLC v. Arriva Pharmaceuticals, Inc.*, 08-00693-SI; *AlphaMed Pharmaceuticals Corp. v. Arriva Pharmaceuticals, Inc.*, 08-00825-SI; and *AlphaMed Pharmaceuticals Corp. v. Arriva Pharmaceuticals, Inc.*, 08-01279-SI. We file the Motion in the latter case only. We assume this Court will set a briefing schedule for the others.

AlphaMed cannot, however, obtain this extraordinary relief for a simple reason: AlphaMed's appeal is moot. As a result, this Court cannot hear AlphaMed's arguments on the merits, and should dismiss the appeal.

Two separate and independent mootness doctrines require dismissal. First, AlphaMed's appeal is equitably moot. Remarkably, AlphaMed failed to ask for a stay of the Plan Confirmation Order from the Bankruptcy Court, this Court, the Ninth Circuit, or the Circuit's Supreme Court Justice. In failing to do this, AlphaMed "neglected diligently to pursue [its] available remedies to obtain a stay of the objectionable orders of the Bankruptcy Court," *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9<sup>th</sup> Cir. 1981). As a result of this neglect—which the Ninth Circuit has called "procedural ineptitude," *id.* at 795—Arriva has implemented the Plan and "gone effective" as a newly reorganized company. Because the parties to the bankruptcy have substantially consummated the Plan, it would be inequitable for this Court to consider AlphaMed's appeal on the merits. *Id.* Second, AlphaMed's appeal is constitutionally moot. The parties to this bankruptcy have substantially consummated the Plan, setting in motion a complicated set of changes in Arriva's relationships to creditors, corporate officers, shareholders and third party vendors. As a result, this Court is "powerless to undo what has already been done," and Article III demands that this Court dismiss the appeal. *In re Focus Media, Inc.*, 378 F.3d 916, 922 (9<sup>th</sup> Cir. 2004) (internal quotation marks omitted); U.S. Const. art. III, § 2

Put simply, as a result of AlphaMed's failure to obtain a stay, the eggs of this bankruptcy case have been scrambled. This Court should not—indeed, cannot—now order the bankruptcy court to "unscramble the eggs." *In re Baker & Drake, Inc.*, 35 F.3d 1384, 1351 (9<sup>th</sup> Cir. 1994). Instead, this Court should dismiss AlphaMed's appeal as equitably and constitutionally moot.

## II. STATEMENT OF FACTS

### A. The Parties to this Appeal

Debtor-Appellee Arriva is a privately held biopharmaceutical company located in Alameda, California. Founded in 1997, Arriva seeks to develop protease inhibitors for



1 treatment of fatal respiratory diseases such as hereditary emphysema, chronic obstructive  
 2 pulmonary disease and asthma. Among other things, Arriva holds the license rights to  
 3 certain patents (the "Protease License"). (Exhibits A and B to the Barr Declaration.)

4 Claimant-Appellant AlphaMed is a Florida corporation founded in 1999 by John  
 5 Lezdey and his sons Darren Lezdey and Jarett Lezdey (collectively, the "Lezdeys").  
 6 Ostensibly launched as a competitor to Arriva, AlphaMed has often served as a vehicle for  
 7 the Lezdeys' harassing litigation.

## 8 **B. The History of Litigation against Arriva**

9 This bankruptcy appeal represents the latest episode in the long-running saga of the  
 10 Lezdeys' and AlphaMed's harassing actions and litigation against Arriva. Indeed, Arriva  
 11 filed for bankruptcy protection principally because of the difficulty in raising funds while  
 12 defending lawsuits against the Lezdeys and AlphaMed and the uncertainty of future  
 13 litigation. We therefore briefly review that history of litigation, beginning with the  
 14 "Arizona Litigation" in 1999.

### 15 **1. The Arizona Litigation**

16 In 1999, one of the founders of Arriva, Dr. Allan Wachter filed suit in Arizona state  
 17 court against the Lezdeys, Protease Sciences, Inc. ("PSI") and other defendants,<sup>2</sup> seeking a  
 18 declaration that the Lezdeys held no valid interest in the Protease License. Dr. Wachter  
 19 filed this suit after it was discovered John Lezdey had fraudulently licensed patents subject  
 20 to the Protease License to AlphaMed. (Exhibit C to the Barr Declaration.)

21 On February 3, 2000, the Arizona Court ruled in Dr. Wachter's favor, finding PSI  
 22 held no valid interest in the Protease License. (Exhibit C to the Barr Declaration.) The  
 23 Arizona Court entered a final judgment against those Lezdey defendants who were not in  
 24 bankruptcy as of that time, namely Darren and Jarett Lezdey (the two Lezdey sons), and JL  
 25 Technology. In so doing, the Arizona Court permanently enjoined all of the Lezdeys from

26 <sup>2</sup> Dr. Wachter named the following defendants: John Lezdey, Doreen Lezdey, Darren  
 27 Lezdey, Jarret Lezdey, J&D Science, Inc., J.L. Technology, LP, Sonoran Desert  
 28 Chemicals LLC, Protease Sciences, Inc., John Does 1 through 100.

1 "acting or speaking, or purporting to act or speak, on behalf of [PSI] or [Sonoran] without  
 2 [Dr. Wachter's] express written consent." (Exhibit D to the Barr Declaration, ¶ III.) In  
 3 addition, the Arizona Court awarded a money judgment in favor of Dr. Wachter and  
 4 Wachter plaintiff parties to the Arizona litigation (the "Wachter Judgment") (Exhibit F to  
 5 the Barr Declaration).

6 After the entry of the Permanent Injunction, the Arizona Court entered an "Under  
 7 Advisement Ruling" against John Lezdey. In that Ruling, the court noted, among other  
 8 things, that John Lezdey had failed to pay court fines, failed to cure contempt citations and  
 9 had taken many actions that constituted a violation of the preliminary injunction. Such  
 10 actions included speaking for Sonoran in a patent interference proceeding in the Patent and  
 11 Trademark Office, appearing in a European Court of Patent Appeals without Dr. Wachter's  
 12 consent, and contacting a group of Arriva investors without Wachter's consent. The  
 13 Ruling ordered John Lezdey to surrender himself to the Maricopa County Sheriff's Office  
 14 for incarceration. (Exhibit G to the Barr Declaration.)

## 15 **2. Litigation in the Northern District of California**

16 Also in 1999, Arriva filed suit in the United States District Court for the Northern  
 17 District of California, case no. 99-012169-SI, seeking a declaration that it held the only  
 18 valid interest in the Protease License. The case was held in abeyance while the Arizona  
 19 Litigation continued. After Arriva obtained favorable orders in the Arizona Litigation,  
 20 Arriva moved to dismiss the California Litigation, including the Lezdeys' counterclaims  
 21 against Arriva. On July 5, 2006, citing the Arizona proceedings, United States District  
 22 Judge Illston dismissed the parties' claims. Among other considerations, District Judge  
 23 Illston relied on principles of federalism and comity, holding that the *Brillhart* doctrine  
 24 prevented her from adjudicating the dispute. (Ex H to the Barr Declaration, 7 et seq.) An  
 25 Arizona Superior Court, District Judge Illston noted, already had considered the issues  
 26 raised in the Arriva Declaratory Relief Case. (Id.) As District Judge Illston held, "comity  
 27 between this Court and the Arizona Superior Court warrants denial of jurisdiction." (Id. at  
 28 7:27-28.) Further:



1 The Court concludes that the [Protease License] issue has  
2 already been extensively litigated in the Arizona court, and that  
3 any litigation in this court would be duplicative. The license's  
4 validity was a specific finding in the court's final judgment and  
5 permanent injunction against Lezdey's sons and J.L.  
6 Technology and in its preliminary injunction order against  
7 Lezdey.

8 (Id. at 8:12-15.) District Judge Illston continued on to note "after obtaining several  
9 adverse rulings in Arizona, defendants [Lezdeys] seek a more favorable forum. The Ninth  
10 Circuit has discouraged such opportunistic maneuvering." (Id. at 11:24-25.)

### 11 **3. The Florida Litigation**

12 In 2003, AlphaMed filed suit against Arriva in the United States District Court for  
13 the Southern District of Florida sitting in diversity. In 2005, the lawsuit proceeded to trial  
14 on three claims: misappropriation of trade secrets, tortious interference with business and  
15 unfair competition. In 2006, the jury returned a verdict against Arriva in the amount of  
16 \$78 million. Despite the jury's verdict, the Court entered judgment as a matter of law in  
17 favor of Arriva, holding that the Lezdeys should take nothing from Arriva and that Arriva  
18 should recover costs from AlphaMed. *See AlphaMed v. Arriva*, 432 F. Supp. 2d 1355  
(S.D. Fla. 2006). (Exhibit I to the Barr Declaration.) AlphaMed has appealed that  
19 judgment. Although the parties fully briefed that appeal, the Eleventh Circuit has not yet  
20 ruled on the matter.

### 21 **4. The Nevada Litigation**

22 On June 14, 2007, John Lezdey, J.L. Technology and Jamie Holdings, LLC, filed a  
23 suit in Nevada state court, seeking a declaration that Arriva's Protease License was invalid.  
24 (Exhibit J to the Barr Declaration.) The Lezdeys sought such a declaration in the Nevada  
25 Complaint for the same reasons they advanced in Arizona State Court and in the United  
26 States District Court for the Northern District of California. The Nevada case has been  
27 automatically stayed due to Arriva's bankruptcy case.

### 28 **5. Arriva's Bankruptcy Filing**

On August 29, 2007, Arriva filed its Chapter 11 bankruptcy petition in the United  
States Bankruptcy Court for the Northern District of California. That case, which

1 underlies this appeal, is docketed in the Bankruptcy Court at no. 07-42767. On the same  
2 day as it filed for bankruptcy, Arriva submitted its first Chapter 11 Plan of Reorganization.  
3 Over the ensuing few months until debtor-in-possession funding was absolutely critical in  
4 October, 2007, Arriva engaged in negotiations with six potential investors over the terms  
5 of the Plan. As negotiations over the Plan continued, Arriva defended against claims filed  
6 by various purported creditors, including AlphaMed. In the end, the Hon. Edward D.  
7 Jellen (the "Bankruptcy Judge") disallowed the claims of AlphaMed, while designating  
8 John Lezdey's vote as having been cast in bad faith. (Exhibits K and N to the Barr  
9 Declaration.)

#### 10 **6. The AlphaMed Adversary Action**

11 On October 30, 2007, during Arriva's bankruptcy proceedings, AlphaMed filed an  
12 adversary complaint against Arriva in the Bankruptcy Court, case no. 07-4181, seeking a  
13 declaration that the Protease License did not belong to Arriva. Arriva promptly filed a  
14 motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The Bankruptcy Court then  
15 dismissed the complaint with prejudice. (Exhibit L to the Barr Declaration.) In dismissing  
16 the complaint, the Bankruptcy Court relied on substantially the same reasons as did United  
17 States District Judge Illston when she dismissed the similar lawsuit in 1999. Specifically,  
18 the United States Bankruptcy Judge Edward E. Jellen relied on principles of federalism  
19 and comity, noting that the *Rooker-Feldman* doctrine prohibited him from directly  
20 reviewing issues already adjudicated by the Arizona Superior Court. (Ex M to the Barr  
21 Declaration, 10:3-14 & 11:14-20.) In addition, Bankruptcy Judge Jellen held AlphaMed  
22 had failed sufficiently to plead standing to maintain its adversary action. (Id.)

#### 23 **7. Arriva's Plan of Reorganization**

24 On January 16 and 17, 2008, the Bankruptcy Court held a full trial on plan  
25 confirmation, during which attorneys for Arriva and AlphaMed examined two witnesses.  
26  
27  
28

1 The Plan<sup>3</sup> received 100% approval from the voting creditors—a resounding affirmation of  
2 Arriva's promise as a newly reorganized business.

3 Then, on January 30, 2008, the Bankruptcy Court entered the Plan Confirmation  
4 Order, confirming the Plan. (Exhibit C to the Preston Declaration.) On February 7, 2008,  
5 AlphaMed appealed the Plan Confirmation Order. However, despite its decision to appeal  
6 the Plan Confirmation Order, AlphaMed—remarkably—neither sought, nor obtained, a  
7 stay of the Plan Confirmation Order from any court. Because the Bankruptcy Court issued  
8 no such stay, Arriva's principals duly implemented the Plan, causing the newly  
9 reorganized Arriva to "go effective." Thus, on February 13, 2008, Arriva formally  
10 emerged from bankruptcy as a reorganized company.

#### 11 **C. Arriva's Plan of Reorganization Becomes Effective**

12 In this bankruptcy case, the Effective Date represents the date on which Arriva  
13 completed the steps necessary to become a newly reorganized company. In the underlying  
14 bankruptcy case, the "closing" on the Effective Date of the Plan represented the  
15 culmination of months of intensive negotiations between the Arriva, its creditors, various  
16 lenders and other parties in interest. The provisions of the Plan reach far and wide,  
17 impacting hundreds of parties, from Arriva's own Board of Directors and other insiders to  
18 scores of third party vendors and stockholders who otherwise had little involvement with  
19 the bankruptcy proceeding. Specifically, on February 13<sup>th</sup>, 2008, Arriva took the  
20 following actions:

- 21 1. Drew down on its \$6 million line of credit provided by its lenders, Nordic  
22 and MPM<sup>4</sup> (Exhibits D and E to the Preston Declaration);

24 <sup>3</sup> A copy of the Plan is attached as Exhibit A to the Preston Declaration. A copy of  
25 the Disclosure Statement for the Plan is attached as Exhibit B to the Preston  
Declaration.

26 <sup>4</sup> "Nordic" consists of Nordic Biotech Venture Fund II K/S. "MPM" consists of  
27 MPM Bioventures II-QP, L.P.; MPM Bioventures II L.P.; MPM Asset Management  
Investors II 2002 BVII LLC; and MPM Bioventures GMBH & Co.  
28 Parellelbeteiligungs KG.

2. Paid to Nordic and MPM loan principal in the amount of \$1.5 million, as well as \$41,333.36 of accrued loan interest (Exhibits D and E to the Preston Declaration);
3. Filed with the California Secretary of State new Articles of Incorporation and adopted new bylaws (Exhibit F to the Preston Declaration);
4. Created a new investors' rights agreement with an eye to making an initial public offering (Exhibit G to the Preston Declaration);
5. Rescinded more than 100,000 shares of old common stock, owned by 18 different shareholders (Exhibit A to the Preston Declaration, ¶¶ 4.4-4.8);
6. Issued 400,000 shares of new common stock to five separate entities comprising Nordic and MPM. MPM and Nordic, as holders of stock, are now free, subject to certain restrictions, to convey portions of those shares to any number of third parties (Exhibits H and I to the Preston Declaration);
7. Rescinded more than 5 million shares of old preferred stock, owned by 65 different individuals and entities (Ex A to the Preston Declaration, ¶¶ 4.4-4.8);
8. Issued 1,500 shares of new Series A preferred stock to five separate entities (Exhibits H and I to the Preston Declaration);
10. Secured settlement with twelve companies and individuals, who effectively withdrew their claims filed in the Bankruptcy Court—worth more than \$31.8 million (documentation of settlements for which Arriva attained court approval are attached as Exhibits J and P to the Preston Declaration);
11. Assumed a contract with QSV Biologics, binding both Arriva and QSV Biologics to continue their reciprocal performance of a contract in which QSV manufactures and provides clinical rAAT to Arriva (Exhibit A to the Preston Declaration, ¶ 8.1 and Schedule G);
12. In connection with the assumption of the contract with QSV Biologics, paid a cure amount exceeding \$273,000, and since confirmation has gone on to

1 pay more than \$648,000, and has been recently invoiced more than \$121,500  
2 for services rendered (Exhibit K to the Preston Declaration);

3 13. Assumed forty executory contracts Arriva had entered into before filing for  
4 bankruptcy, as enumerated in "Schedule G" submitted to the bankruptcy  
5 court (Exhibit A to the Preston Declaration, § 8.1 and Schedule G). By  
6 assuming the contracts, Arriva bound itself and those companies to continue  
7 their reciprocal performance just as they had done before Arriva filed for  
8 bankruptcy;

9 14. Paid more than \$75,000 to Hefferman Insurance Brokers for its director's and  
10 officer's insurance (Exhibit L to the Preston Declaration);

11 15. Funded a pot in the amount of \$776,000 from which creditors eventually will  
12 recover their claims (Exhibit M to the Preston Declaration);

13 16. Commenced distribution of funds from this pot to creditors (Exhibit N to the  
14 Preston Declaration);

15 17. Continued to expend funds as part of its monthly operating budget as a  
16 newly reorganized company. For example, in February, Arriva planned to  
17 spend approximately \$170,100 on non-bankruptcy-related costs. In March,  
18 Arriva plans to spend approximately \$766,610 on such costs; and Arriva  
19 plans to spend approximately \$332,000 in April; and approximately  
20 \$237,000 in May (Exhibits E and O to the Preston Declaration);

21 18. Received by assignment from Dr. Wachter his interest in the Wachter  
22 Judgment. That judgment, initially worth \$17 million, has now become an  
23 asset of Arriva as a newly reorganized company (Exhibit P to the Preston  
24 Declaration); and

25 19. In connection with all the above activities, sent notice to more than 200  
26 entities and individuals of Arriva's new status as a reorganized company  
27 (Exhibit Q to the Preston Declaration).  
28



1 Finally, Nordic created a corporate entity in the Netherlands, named Arriva  
2 Pharmaceuticals, B.V., to support the funding of the reorganized Debtor.

### 3 **D. This Appeal**

4 AlphaMed neglected to seek a stay of the Plan Confirmation Order. Instead, on  
5 February 7, 2008, AlphaMed filed a notice of appeal to the Ninth Circuit Bankruptcy  
6 Appellate Panel (the "BAP"), depriving the Bankruptcy Court of the power to issue a stay  
7 in the first instance. On February 8, 2008, Arriva filed a Statement of Election,  
8 transferring the appeal to this Court. On March 28, 2008, this case was associated before  
9 United States District Judge Illston. Arriva now moves to dismiss AlphaMed's appeal as  
10 equitably and constitutionally moot.

## 11 **III. ARGUMENT**

### 12 **A. The Mootness Doctrine Is Very Broad in the Context of Bankruptcy**

13 In the bankruptcy context, mootness doctrine is extremely broad. Two separate  
14 theories of mootness support dismissal of this appeal: equitable mootness and  
15 constitutional mootness.

#### 16 **1. The Rule of Equitable Mootness**

17 In the Ninth Circuit, under the well-established rule of *In re Roberts Farms, Inc.*,  
18 652 F.2d 793, (9<sup>th</sup> Cir. 1981), a bankruptcy appeal becomes "equitably moot" where  
19 appellants (1) "neglect[] diligently to pursue their available remedies to obtain a stay of the  
20 objectionable orders of the Bankruptcy Court" thus causing (2) "a comprehensive change  
21 of circumstances to occur as to render it inequitable" for the appellate court to consider the  
22 merits." *Id.* at 798; *In re Baker & Drake, Inc.*, 35 F.3d 1348, 1351 (9th Cir. 1994); *In re*  
23 *Popp*, 323 B.R. 260, 271 (9<sup>th</sup> Cir. BAP 2005). If it is inequitable to consider the merits,  
24 then a court must dismiss the appeal as moot.<sup>5</sup>

25  
26 <sup>5</sup> *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9<sup>th</sup> Cir. 1981), has been cited with  
27 approval by every other Circuit other than the Federal Circuit (which does not  
28 consider bankruptcy appeals). *See In re Public Serv. Co.*, 963 F.2d 469, 472 (1st  
Cir. 1992); *In re Chateaugay Corp.*, 10 F.3d 944, 953 (2d Cir. 1993); *In re United*  
*Artists Theatre Co.*, 315 F.3d 217, 228 (3<sup>rd</sup> Cir. 2003); *Central States, Southeast &*



1 The Ninth Circuit takes an especially dim view of appellants who "flunk[] the first  
 2 step" of diligently pursuing available remedies and seeking a stay. *In re Roberts Farms,*  
 3 *Inc.*, 652 F.2d. at 798. Indeed, the Ninth Circuit has deemed the failure to obtain a stay  
 4 "procedural ineptitude," *id.* at 795, meriting rapid dispatch from the appellate forum. As  
 5 far back as 1980, the Ninth Circuit made it "obligatory," *id.* at 798, to seek a stay from the  
 6 bankruptcy court, the District Court, the Ninth Circuit *and* the Circuit's Supreme Court  
 7 Justice before the district court can begin to consider the unstayed appeal. *Id.* at 798  
 8 (holding that an appellant must seek a stay "even to the extent of applying to the Circuit  
 9 Justice for relief"). Indeed, if "an appellant fails to obtain a stay after exhausting all  
 10 appropriate remedies, that well may be the end of his appeal." *Id.* In 1994, the Ninth  
 11 Circuit spoke more directly: "Failure to obtain a stay, standing alone, is often fatal." *In re*  
 12 *Baker & Drake, Inc.*, 35 F.2d 1348, 1352 (9<sup>th</sup> Cir. 1994). Congress concurs with this  
 13 judicial assessment; under Fed. R. Bankr. P. 8005, a "motion for a stay of the judgment,  
 14 order, or decree of a bankruptcy judge . . . must ordinarily be presented to the bankruptcy  
 15 judge in the first instance."

16 If an appellant has failed to obtain a stay, courts then consider whether there has  
 17 been a "comprehensive change of circumstances." A "comprehensive change of  
 18 circumstances" occurs where the parties have brought a plan to "substantial  
 19 consummation." *In re Gotcha Int'l L.P.*, 311 B.R. 250, 254 (BAP 9<sup>th</sup> Cir. 2004); *Baker v.*  
 20 *Drake, Inc. v. Public Serv. Comm'n*, 35 F.3d 1348, 1351 (9<sup>th</sup> Cir. 1994) Substantial  
 21 consummation, in turn, depends on a fact-intensive inquiry circumscribed by three  
 22 statutory factors. The Bankruptcy Code defines substantial consummation as:

23 (A) a transfer of all or substantially all of the property proposed  
 24 by the plan to be transferred;

25 *Southwest Areas Pension Fund v. Central Transport, Inc.*, 841 F.2d 92, 96 (4th Cir.  
 26 1988); *In re Berryman Prods.*, 159 F.3d 941, 944 n.8 (5<sup>th</sup> Cir. 1998); *Ohio v.*  
 27 *Madeline Marie Nursing Homes # 1 & # 2*, 694 F.2d 449, 462-63 (6th Cir. 1982); *In*  
 28 *re UNR Indus.*, 20 F.3d 766, 769 (7th Cir. 1994); *In re Information Dialogues, Inc.*,  
 662 F.2d 475, 477 (8th Cir. 1981); *In re Bel Air Assocs.*, 706 F.2d 301, 305, n.10  
 (10th Cir. 1983); *In re Club Assocs.*, 956 F.2d 1065, 1068 n.10 (11th Cir. 1992); *In*  
*re AOV Indus.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986)

- (B) an assumption by the debtor . . . under the plan of the business or management of all or substantially all of the property dealt with by the plan; and  
 (C) commencement or distribution under the plan.

11 U.S.C. § 1101(2). A comprehensive change in circumstances gives rise to a presumption of mootness. *In re Chateaugay Corp.*, 10 F.3d 944, 952 (2d Cir. 1993) (*Chateaugay II*); *In re Chateaugay Corp.*, 94 F.3d 772, 776 (2d Cir. 1996) ("*Chateaugay III*") ("Reviewing courts presume that it will be inequitable or impractical to grant relief after substantial consummation of a plan or reorganization."). In response, the appellant can rebut that presumption *only* by showing that *each one of five factors*<sup>6</sup> inhere. *Id.* at 952-53. To date, the Ninth Circuit has not explicitly adopted this presumption of mootness. However, when the Second Circuit explained the presumption of mootness, it relied primarily on Supreme Court and Ninth Circuit precedent. *Id.* (citing *Church of Scientology v. United States*, 506 U.S. 9 (1992) and *In re Roberts Farms, Inc.*, 652 F.2d at 793). Therefore, Ninth Circuit case law already embodies the presumption of mootness, and this Court should apply the presumption in this case as well.

This doctrine of equitable mootness is not legal trivia. The doctrine is centrally important to context of bankruptcy, "where the ability to achieve finality is essential to the fashioning of effective remedies." *Chateaugay I*, 988 F.2d at 325. After all, "completed acts in accordance with an unstayed order of the bankruptcy court must not thereafter be routinely vulnerable to nullification if a plan of reorganization is to succeed." *Id.* at 326; *In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172 (explaining the "policy of finality" in bankruptcy).

<sup>6</sup> Those factors are: "(a) the court can still order some effective relief; (b) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity; (c) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court; (d) the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings; and (e) the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order . . . if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from." *Chateaugay II*, 10 F.3d at 953 (internal citations and quotation marks omitted).

## 2. The Rule of Constitutional Mootness

A bankruptcy appeal becomes constitutionally moot where the appellate court can no longer fashion effective relief. *In re Focus Media, Inc.*, 378 F.3d 916, 922 (9<sup>th</sup> Cir. 2004). "The duty of an Article III court is to decide live controversies, 'not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993) ("*Chateaugay I*") (citing *Mills v. Green*, 159 U.S. 651, 653 (1895); *In re Combined Metals Reduction Co.*, 557 F.2d 179, 187 (9<sup>th</sup> Cir. 1977) (Courts may only "decide actual controversies by a judgment which can be carried into effect."); U.S. Const. art. III, § 2 (delimiting Article III courts' jurisdiction to actual "cases" and "controversies"). As a result, when an "event occurs which renders it impossible . . . to grant . . . any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal as moot." *In re Combined Metals Reduction Co.*, 557 F.2d at 187; *Chateaugay I*, 988 F.2d at 325; see also *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990).

In the bankruptcy context, such an "event" foreclosing effective relief occurs readily when a reorganized debtor sets its plan in motion. This is because a plan of reorganization widely redistributes property. Thus, "[f]or example, when a trustee has already sold assets to third parties, a court may be powerless 'to undo what has already been done.'" *In re Focus Media, Inc.*, 378 F.3d at 923 (quoting *In re Combined Metals Reduction Co.*, 557 F.2d at 187); *Baker v. Drake, Inc. v. Public Serv. Comm'n*, 35 F.3d 1348, 1351 (9<sup>th</sup> Cir. 1994) (noting that transfer of property "to a third party precludes meaningful relief"). These constitutional "principles are especially pertinent in bankruptcy proceedings, where the ability to achieve finality is essential to the fashioning of effective relief." *Chateaugay I*, 988 F.2d at 325.

## B. The AlphaMed Appeal Is Equitably Moot

AlphaMed has failed to seek a stay, thus permitting the Plan to become effective. This, in turn, has resulted in a comprehensive change of circumstances such that it would

1 be inequitable for this Court to consider the AlphaMed appeal on the merits. Accordingly,  
2 this Court must dismiss AlphaMed's appeal as equitably moot.

3 **1. AlphaMed Failed to Obtain a Stay of the Plan Confirmation Order**

4 To begin with, AlphaMed has "neglected diligently to pursue their available  
5 remedies to obtain a stay of the objectionable orders of the Bankruptcy Court." *In re*  
6 *Roberts Farms, Inc.*, 652 F.2d at 798. AlphaMed's obligation to seek and obtain this stay  
7 is no legal technicality or trap for the unwary. To the contrary, for almost thirty years the  
8 Ninth Circuit has frowned upon bankruptcy appellants such as AlphaMed who fail to  
9 obtain a stay of the order confirming the plan of reorganization. Moreover, a stay is  
10 "obligatory," *id.* at 798: If an appellant fails to obtain one, "that well may be the end of his  
11 appeal," *id.*

12 Here, AlphaMed has failed to obtain a stay. We ask this Court to consider the  
13 practical dimensions of this neglect: In bankruptcy, a party aggrieved by the confirmation  
14 of a plan of reorganization need not sit helplessly on the sidelines while the debtor  
15 effectuates the Plan. Here, when the Bankruptcy Judge orally announced the decision to  
16 confirm Arriva's plan of reorganization on January 16, 2008, AlphaMed should have orally  
17 moved in open court for a stay pending appeal. The Plan Confirmation Order, like most  
18 orders, was not entered that same day, but instead was entered later on January 30, 2008.  
19 AlphaMed should have at least asked the Bankruptcy Court for a stay before the Court  
20 entered the order. Even if the Bankruptcy Court denied the stay, AlphaMed still would  
21 have had the benefit of an automatic stay that lasted for ten days after entry of the Plan  
22 Confirmation Order. Fed. R. Bankr. P. 3020(e). That ten-day period is meant to provide  
23 parties such as AlphaMed additional time to seek a stay from the District Court, the Ninth  
24 Circuit *and* the Circuit's Supreme Court Justice. *In re Roberts Farms, Inc.*, 652 F.2d. at  
25 798. But AlphaMed took advantage of none of these protections. Instead, AlphaMed  
26 remained silent—and then abruptly filed a notice of appeal to the BAP. Indeed, AlphaMed  
27 remained silent "despite the unambiguous directions of Bankruptcy Rule [8005]," and  
28 despite nearly three decades of Ninth Circuit case law admonishing bankruptcy appellants

1 to seek a stay in the bankruptcy court. *In re Roberts Farms, Inc.*, 652 F.2d at 796; *see* Fed  
 2 R. Bankr. 8005 ("A motion for a stay of the judgment, order or decree . . . must ordinarily  
 3 be presented to the bankruptcy judge in the first instance.").

4 In the absence of a stay, Arriva duly brought the Plan effective. By permitting  
 5 Arriva to bring the Plan effective while it silently harbored an objection, AlphaMed  
 6 "neglected diligently to pursue [its] available remedies." In this way, AlphaMed's conduct  
 7 satisfies the first factor of *In re Roberts Farms, Inc.*, 652 F.2d at 798.

## 8 **2. The Plan Has Been Substantially Consummated**

9 AlphaMed's failure to obtain a stay is not harmless. To the contrary, it has resulted  
 10 in a "comprehensive change of circumstances" insofar as Arriva has brought the Plan to  
 11 "substantial consummation." *In re Gotcha Int'l L.P.*, 311 B.R. 250, 254 (BAP 9<sup>th</sup> Cir.  
 12 2004). The Bankruptcy Code defines substantial consummation as:

- 13 (A) a transfer of all or substantially all of the property proposed  
 by the plan to be transferred;
- 14 (B) an assumption by the debtor . . . under the plan of the  
 business or management of all or substantially all of the  
 15 property dealt with by the plan; and
- 16 (C) commencement or distribution under the plan.

17 11 U.S.C. § 1101(2).

18 Here, Arriva has transferred "substantially all of the property proposed by the [P]lan  
 19 to be transferred." 11 U.S.C. § 1101(2)(A). As enumerated in section II.C, *supra*, Arriva  
 20 has drawn down \$6 million in loan funds, while repaying more than \$1.5 million in  
 21 principal and loan interest. Arriva cancelled all its old stock and issued more than 400,000  
 22 shares of new common stock and series A preferred stock to dozens of entities and  
 23 individuals, each of which is now free to convey those shares of stock to third parties.  
 24 Arriva has assumed forty significant executory contracts, thus committing itself and  
 25 numerous innocent third parties to future performance under those contracts ever since the  
 26 Effective Date.  
 27  
 28



1 Arriva also has received, by assignment, the Wachter Judgment, in the face amount  
2 of \$17 million. Meanwhile, Arriva has continued to expend hundreds of thousands of  
3 dollars per month as part of its operating budget as a newly reorganized company.

4 Further, Arriva has assumed "the business or management of all or substantially all  
5 of the property dealt with by the [P]lan." 11 U.S.C. § 1101(2)(B). Specifically, on  
6 February 13, 2008, Arriva installed its new Board of Directors and filed with the Secretary  
7 of State of California its amended articles of incorporation. In addition, Arriva created an  
8 investors' rights agreement with an eye to making an initial public offering. As described  
9 above, Arriva has issued hundreds of thousands of new shares of stock to a number of  
10 individuals and entities, thus transferring shareholder ownership of Arriva to a new set of  
11 individuals and entities. Indeed, Nordic created a corporate entity in the Netherlands,  
12 named Arriva Pharmaceuticals, B.V., to support the funding of the reorganized Debtor.  
13 Finally, in connection with these activities, Arriva has issued notice to more than 200  
14 individuals and entities of Arriva's new status as a newly reorganized company.

15 Finally, Arriva's distribution under the Plan has commenced. 11 U.S.C. §  
16 1101(2)(C). Specifically, on February 13, 2008, Arriva funded a large pot—in the amount  
17 of \$776,000—from which creditors eventually will recover their claims. As part of its  
18 duties under the Plan, Arriva duly has begun to distribute sums from this pot to creditors.

19 In this way, Arriva has substantially consummated this plan, causing "a  
20 comprehensive change of circumstances," rendering it inequitable for this Court to  
21 consider the merits. *In re Roberts Farms, Inc.*, 652 F.2d at 798. As a result, the second  
22 factor of *In re Roberts Farms, Inc.*, 652 F.2d at 798, is present.

### 23 **3. The AlphaMed Appeal Is Equitably Moot**

24 Because both factors of *In re Roberts Farms, Inc.*, 652 F.2d at 798, are present,  
25 there arises a presumption that AlphaMed's appeal is equitably moot. *Chateaugay III*, 94  
26 F.3d at 776. Therefore, unless AlphaMed rebuts the presumption using the five factors of  
27 *Chateaugay II*, 10 F.3d at 953, this Court must dismiss the appeal as moot.

28



1 However, even if this Court does not apply the *Chateaugay* presumption of  
 2 mootness, it still must dismiss AlphaMed's appeal as moot. Arriva has changed the  
 3 relationships among a myriad of parties, drawing down on loans, paying debts, committing  
 4 itself and more than forty innocent third parties to performing under assumed contracts,  
 5 transferring shares of stock, allowing to be created a corporate counterpart in the  
 6 Netherlands and inducing widespread reliance by third parties on the integrity of the  
 7 confirmed Plan. Each of these entities has relied on the integrity of the Plan, initiating  
 8 their own downstream dealings on the reasonable assumption Arriva's status as a newly  
 9 reorganized company will not be undone. In other words, the eggs of this bankruptcy have  
 10 been scrambled. It would be inequitable—indeed, unworkable—for this Court now to  
 11 order the Bankruptcy Court to unscramble the eggs.

12 **C. The AlphaMed Appeal Is Constitutionally Moot**

13 The AlphaMed appeal of the unstayed Plan Confirmation Order is constitutionally  
 14 moot. On February 13, 2008, Arriva effectuated the Plan, thus consummating a  
 15 complicated set of transactions among a myriad of parties. As a result of the  
 16 consummation of these transactions, for simple, practical reasons, this Court is "powerless  
 17 'to undo what has already been done.'" *In re Focus Media, Inc.*, 378 F.3d at 923 (quoting  
 18 *In re Combined Metals Reduction Co.*, 557 F.2d at 187); *In re Baker & Drake, Inc.*, 35  
 19 F.3d at 1351; *Armster v. United States Dist. Court for Cent. Dist.*, 806 F.2d 1347, 1354  
 20 (9th Cir. 1986); *In re Charlton*, 708 F.2d 1449, 1454 (9th Cir. 1983). Accordingly, U.S.  
 21 Const. art. III, § 2 demands that this Court dismiss AlphaMed's appeal.

22 To begin with, Arriva's use of the line of credit provided by its lenders makes this  
 23 appeal moot. Before the Effective Date of the Plan, Nordic was the agent lender to the  
 24 Debtor under a Debtor-in-Possession Loan to the Debtor ("DIP Loan"). Prior to the  
 25 February 13, 2008 Effective Date, Nordic had participated in only a \$1.5 million DIP  
 26 Loan. At that time, Nordic had no shareholder interest in the Debtor; it was just a lender.  
 27 But then, in reliance on the unstayed Confirmation Order, Nordic and MPM on the  
 28 Effective Date advanced another \$2.5 million to allow the Plan to become effective.

1 Nordic and MPM also advanced on that date \$1.5 million to allow the DIP Loan to be  
2 paid. In so doing, Nordic and MPM became more than just lenders. They became equity  
3 shareholders of Arriva as a reorganized company. After the Effective Date, Nordic and  
4 MPM made further advances on the \$6 million loan. Specifically, Nordic and MPM  
5 advanced \$500,000 to the Reorganized Debtor on February 20, 2008 and advanced another  
6 \$750,000 on March 19, 2008. Arriva anticipates that by the time this Court hears this  
7 Motion on May 23, Nordic and MPM will have advanced, on April 30, 2008, another  
8 \$750,000 to complete the total of the \$6 million financing.

9 Before the Effective Date, MPM was not only the lead shareholder in Arriva, but  
10 also enjoyed representation on Arriva's board. MPM participated in the Nordic DIP Loan  
11 and indeed, at the beginning of Arriva's bankruptcy, MPM filed substantial proofs of claim  
12 totaling millions of dollars. But on the Effective Date, all this changed. MPM  
13 relinquished its shareholder interest in Arriva, and dismissed its millions of dollars of  
14 claims against the Debtor. MPM additionally gave up its seats on Arriva's board and  
15 participated in additional financing to the Reorganized Debtor.

16 Similarly, Arriva has continued its transactions with third party vendors and paid  
17 cures in order to assume over forty executory contracts. Pursuant to these contracts, Arriva  
18 and more than forty innocent third parties have continued their reciprocal performance,  
19 exchanging money for services and goods. In addition, these parties have engaged in their  
20 own downstream business dealings—all in reliance on the Plan Confirmation Order. Also,  
21 Arriva has issued new shares of stock, begun payment to its creditors and Nordic has  
22 created a corporate entity in the Netherlands, Arriva Pharmaceuticals, B.V. Now that  
23 Arriva has taken all these steps, they cannot be undone. Indeed, any attempt to do so  
24 would not result in "relief" at all, but would merely create an "unmanageable,  
25 uncontrollable situation for the Bankruptcy Court." *In re Roberts Farms, Inc.*, 652 F.2d at  
26 797. Thus, to the extent reversal would require the return of these funds and an undoing of  
27 Arriva's actions over the past few months, this Court cannot fashion effective relief and  
28 must dismiss AlphaMed's appeal as constitutionally moot.

1 The result may seem harsh, but it is a product of AlphaMed's own neglect. In a  
2 more typical situation, the bankruptcy appellant would have obtained a stay from the  
3 bankruptcy court. But here, AlphaMed did not even ask for such a stay, and Arriva duly  
4 brought its Plan effective for the benefit of all creditors. As a result, this Court cannot  
5 fashion effective relief and the appeal is moot. Accordingly, U.S. Const. art. III, § 2  
6 requires that this Court "not proceed to a formal judgment, but [instead] dismiss the  
7 appeal." *In re Combined Metals Reduction Co.*, 557 F.2d at 187. In other words, the eggs  
8 of this bankruptcy have been scrambled, *In re Baker & Drake, Inc.*, 35 F.3d at 1351, and  
9 they cannot now be unscrambled.

10 For this reason, too, this Court must dismiss AlphaMed's appeal as moot.

#### 11 IV. CONCLUSION

12 For the reasons stated above, this Court must dismiss with prejudice AlphaMed's  
13 appeal as moot.  
14

15  
16  
17 DATED: April 16, 2008

18 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

19  
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